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CPLR 3211(c): Conflict Over Propriety of Pre-Joinder Motion for Summary Judgment

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CPLR 3126: Penalty imposed on attorney for failure to disclose.

CPLR 3126 prescribes the penalties that may be imposed on a party who refuses to disclose information either willfully or in disobedience of a court order. The court is not, however, confined to the sanctions specifically enumerated in this section:[90] it may "make any such orders that are just."[91] One alternative devised by the courts is to conditionally deny a motion seeking the harsh remedies listed under CPLR 3126 with a provision that the recalcitrant party or his attorney compensate the other party by the payment of costs and/or attorney's fees.[92] As illustrated by *Cotteral v. City of New Rochelle*,[93] this approach preserves the sanctity of a court order while it safeguards the defendant from prejudice due to the delay.[94]

In *Cotteral*, the appellate division found that the conduct of plaintiffs' attorney in delaying an examination before trial was inexcusable; nevertheless, the court also recognized the severity of the lower court's order which dismissed the infant plaintiff's cause of action. Hence, the court conditioned its reversal upon the payment of $200 costs to defendant by the plaintiffs' attorney.

CPLR 3211(c): Conflict over propriety of pre-joinder motion for summary judgment.

A court may treat a motion to dismiss a cause of action or defense under CPLR 3211(c) as a motion for summary judgment. However, a conflict has arisen regarding whether such a motion should be granted before issue has been joined. Two recent cases nurture this controversy.

In *Kronish, Lieb, Shainswit, Weiner, & Hellman v. John J. Reynolds, Inc.*,[95] the First Department reasoned that a motion under 3211(c) is independent of the provisions contained in CPLR 3212. Hence, the prohibition against pre-joinder summary judgment contained in the latter section[96] was deemed inapposite.[97] However, in

90 CPLR 3126 expressly provides that the court may issue a resolution order, a preclusion order, and a stay, dismissal or default order.

91 *Id.* See 7B McKINNEY'S CPLR 3126, commentaries 1, 8-12, at 640, 649-55 (1970).

92 *See, e.g.*, Nomako v. Ashton, 22 App. Div. 2d 683, 253 N.Y.S.2d 309 (1st Dep't 1964); Warner v. Bumgarner, 49 Misc. 2d 488, 267 N.Y.S.2d 825 (Sup. Ct. Monroe County 1966); Di Bartolo v. American & Foreign Ins. Co., 48 Misc. 2d 843, 265 N.Y.S.2d 981 (Sup. Ct. Suffolk County 1966).

93 33 App. Div. 2d 791, 307 N.Y.S.2d 568 (2d Dep't 1970).

94 *See* 3 WK&M ¶ 3126.14.

95 33 App. Div. 2d 366, 307 N.Y.S.2d 725 (1st Dep't 1969).

96 CPLR 3212 provides: "Except as provided in subdivision (d) . . . any party may move for summary judgment in any action, after issue has been joined."

97 *See also* Firestone v. First Dist. Dental Soc'y, 24 App. Div. 2d 268, 265 N.Y.S.2d 525 (1st Dep't 1965).

Lustig v. Congregation B'Nai Israel,[98] the Supreme Court, Kings County, in adherence to the position of the Second Department, held that a 3211(c) motion is analogous to one brought under 3212 and, therefore, the same rules should govern.[99] The Third Department has expressed a similar view.[100]

Professor David Siegel agrees with the approach taken by the First Department, asserting that there is no indication in the language of CPLR 3211(c) that a court's power to grant summary judgment is limited to post-joinder motions. Moreover, since seven out of ten objections listed under CPLR 3211(a) must be made before answer, the authority conferred by 3211(c) would be useless if the movant were compelled to await joinder of issue.[101] Hopefully, the conflict will soon be resolved by the Court of Appeals.[102]

CPLR 3213: Support clause in separation agreement considered an instrument for the payment of money.

The seemingly clear and unequivocal language of CPLR 3213[103] continues to present problems of interpretation as courts, hindered by the absence of definitive precedent,[104] strive to discern what instruments are included in the phrase "instrument for the payment of money only."[105] The basis for this dilemma is the apparent conflict between the revisors' intent and the statute as finally enacted. For, the intendment was to provide a speedy method for adjudicating

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98 62 Misc. 2d 216, 308 N.Y.S.2d 480 (Sup. Ct. Kings County 1970).

99 *See* Pisano v. County of Nassau, 41 Misc. 2d 844, 246 N.Y.S.2d 733 (Sup. Ct. Nassau County 1963), *aff'd without opinion*, 21 App. Div. 2d 754, 252 N.Y.S.2d 22 (2d Dep't 1964).

100 *See* Milk v. Gottschalk, 29 App. Div. 2d 698, 286 N.Y.S.2d 39 (3d Dep't 1968). This holding apparently supersedes the decision granting pre-joinder summary judgment in Dana v. Board of Supervisors, 48 Misc. 2d 876, 266 N.Y.S.2d 229 (Sup. Ct. St. Lawrence County 1966).

101 7B McKINNEY'S CPLR 3211, commentary 45, at 49 (1970).

102 In any event, all of the departments are in agreement that a court should advise the parties that a motion to dismiss will be treated as a motion for summary judgment. *See, e.g.*, Mareno v. Kibbe, 32 App. Div. 2d 825, 302 N.Y.S.2d 324 (2d Dep't 1969).

103 CPLR 3213 permits the service of a summons and motion for summary judgment in lieu of complaint when an action "is based upon an instrument for the payment of money only or upon any judgment."

104 This lack of guidance stems from the fact that the predecessors of the CPLR did not offer a plaintiff similar relief. Moreover, the legislative documents are lacking in suggestions as to when the motion should lie. *See* FIRST REP. 91; FIFTH REP. 492; SIXTH REP. 338.

105 *See, e.g.*, Holmes v. Allstate Ins. Co., 33 App. Div. 2d 96, 305 N.Y.S.2d 563 (1st Dep't 1969); Seaman-Andwall Corp. v. Wright Mach. Corp., 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968); Orenstein v. Orenstein, 59 Misc. 2d 565, 299 N.Y.S.2d 648 (App. T. 2d Dep't 1969), *rev'g* 58 Misc. 2d 377, 295 N.Y.S.2d 116 (N.Y.C. Civ. Ct. Queens County 1968); All-O-Matic Mfg. Corp. v. Shields, 59 Misc. 2d 199, 298 N.Y.S.2d 268 (Dist. Ct. Nassau County 1969). *See also The Quarterly Survey*, 44 ST. JOHN'S L. REV. 335-38 (1969).